SEQUEL TO WORKMEN'S COMPENSATION ACTS.

[*Continued.*]

IT may be contended that such of the Workmen's Compensation Acts as purport to apply only to extra-hazardous occupations are not incongruous with the modern common law of torts. This class of acts, it will be said, fall under (are applications of) the exceptional, but well-recognized, doctrine of absolute liability in cases of extra-hazardous uses or conduct. How much ground is there for this contention?

The fundamental general principle of the modern common law of torts is, that fault is requisite to liability. To this general principle the common-law courts have established (*inter alia*) the following exception — That one who makes extra-hazardous uses of property, or who indulges in extra-hazardous conduct, acts at peril and is absolutely liable, irrespective of negligence, for damage so occasioned.[1]

At the beginning of Workmen's Compensation legislation there was a tendency to confine the operation of the statute to certain specified occupations, which were regarded by a majority of the legislators as specially hazardous. At the present moment the drift is unmistakably in the opposite direction. A large majority of the most recent statutes are not restricted to those employments which might be considered extra-hazardous, but apply to nearly all manual occupations.[2] A brief survey of the history of Workmen's Compensation legislation clearly shows both the original tendency and the present inclination.

The initial English Act of 1897, 60 & 61 Vict., ch. 37, was admittedly an experiment. It applies only to certain specified occupations, most or all of which were probably deemed by a

[1] This exceptional doctrine is regarded unfavorably by some high authorities. See Pollock on Torts, 6 ed., 467–8, 473–4, 623–4; 1 Street, Foundations of Legal Liability, 84, 85; and compare Bishop, Non-Contract Law, §§ 1225 and 1230; 2 Cooley, Torts, 3 ed., 696–7, 706–8. But we think that, for the present at least, there will be in every community some uses or conduct which the courts will hold to be extra-hazardous. These, however, will not be the same in all countries.

[2] Some exceptions which are frequently made are stated in a later note.

majority of the legislators to involve special hazard to workmen. It does not contain a requirement that the accident shall be due to one of those risks "which give to the business its extra-hazardous character." This earlier statute has been superseded by the Act of 1906, 6 Edw. VII, ch. 58, now in force. The framers of the later statute make no pretense of confining its operation to extra-hazardous occupations. It "imposes the duty of compensation upon the employer by reason of the mere relation of employment and of the connection of the injury with the employment, quite irrespective of the nature of the employment." [3] The Act of 1906 includes, *inter alia*, domestic service, ordinary farm work, and clerical labor. With some exceptions, it applies to all regular employees who work for wages.[4]

The various Workmen's Compensation Acts in the British Colonies differ widely from each other as to the kinds of occupation included; and so do such acts in countries other than the British Dominions and the United States.[5]

The Workmen's Compensation statutes enacted in the United States may be divided into two classes:

Class 1. Those which purport to confine their operation to extra-hazardous occupations.

Class 2. Those which make no pretense of restricting their application to extra-hazardous occupations.[6]

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[3] Prof. Freund, 2 Report of U. S. Commission, 262; 2 Amer. Labor Legislation Review, 56.

[4] "'Workmen' does not include any person employed otherwise than by way of manual labour whose remuneration exceeds two hundred and fifty pounds a year, or a person whose employment is of a casual nature and who is employed otherwise than for the purposes of the employer's trade or business, or a member of a police force, or an out-worker, or a member of the employer's family dwelling in his house, but save as aforesaid, means any person who has entered into or works under a contract of service or apprenticeship with an employer whether by way of manual labour, clerical work, or otherwise, and whether the contract is express or implied, is oral or in writing." English Act of 1906, 6 Edw. 7, ch. 58, § 13. "Definitions."

[5] See summaries: 5 Labatt, Master and Servant, 2 ed., § 1803; Report of Massachusetts Commission on Compensation for Industrial Accidents, A. D. 1912, pp. 55–76.

[6] Statutes in Class 2, like those in Class 1, generally adopt the English provision excluding a person "whose employment is of a casual nature and who is employed otherwise than for the purposes of the employer's trade or business."

Some of the statutes apply only to those masters who regularly employ not less than a specified number of workmen; *e. g.* five or fifteen. In several states there are express provisions excluding farm and domestic service. In Rhode Island an employee,

If we look only at statutes enacted prior to 1913, the states are nearly equally divided between Class 1 and Class 2.[7] There were seven states in Class 1 and eight states in Class 2, if we include in Class 1 the New York Act of June 25, 1910, ch. 674, and in Class 2 the New York Act of May 23, 1910, ch. 352.[8]

The legislation enacted in 1913, prior to December 1, shows a very strong preponderance in favor of Class 2. Two states, Nevada and Illinois, changed from Class 1 to Class 2.[9] Seven

to come under the act, must be one "whose remuneration does not exceed eighteen hundred dollars a year." R. I. Law of 1912, ch. 831, Article V, § 1, Paragraph (b).

With the above exceptions, the statutes in Class 2 apply to nearly all occupations carried on by manual labor.

[7] We omit the Montana Act of March 4, 1909, ch. 67, which was *held* unconstitutional in 1911, in 44 Mont. 180, 221–222. It was a compulsory act for the creation of a state Insurance Fund for the benefit of coal miners and coal workers.

[8] Up to Dec. 31, 1912, the six following states had passed acts applying only to certain specified occupations, all of which were expressly declared to be extra-hazardous or specially dangerous: Arizona, Act of June 8, 1912, ch. 14. Illinois, Act of June 10, 1911, § 2 (since changed by Act of 1913, cited in later note). Kansas, Act of March 14, 1911, ch. 218. Nevada, Act of March 24, 1911, ch. 183 (since changed by Act of 1913, cited in later note). New Hampshire, Act of April 15, 1911, ch. 163. New York, Act of June 25, 1910, ch. 674 (*held* unconstitutional in Ives *v.* South Buffalo R. Co., 1911, 201 N.Y. 271). With the above must be classed the state of Washington Workmen's Compensation Act, Laws of 1911, ch. 74, which purports to apply only to occupations which are deemed extra-hazardous. It enumerates a considerable number of occupations "intended to be embraced within the term 'extra-hazardous' wherever used in this act"; and then provides: "If there be or arise any extra-hazardous occupation or work other than those herein above enumerated, it shall come under this act. . . ." The Washington act was *held* constitutional in State *v.* Clausen, 1911, 65 Wash. 156.

Up to Dec. 31, 1912, the eight following states had passed acts which made no pretense of restricting their application to extra-hazardous occupations: California, Act of April 18, 1911, ch. 399 (and see Act of May 26, 1913, ch. 176). Massachusetts, Act of July 28, 1911, ch. 751. Michigan, Act of March 20, 1912, Act No. 10. New Jersey, Act of April 4, 1911, ch. 95. New York, Act of May 23, 1910, ch. 352. Ohio, Act of June 15, 1911, vol. 102, Ohio Laws, 524 (and see Act of March 14, 1913). Rhode Island, Act of April 29, 1912, ch. 831. Wisconsin, Act of May 3, 1911, ch. 50. Perhaps we ought to add the Maryland Act of April 15, 1912, Laws of 1912, ch. 837, which may be termed "an elective insurance act." In four of these states the constitutionality of the statute has been upheld by the court. Opinion of the Justices, 1911, 209 Mass. 607; State *v.* Creamer, 1912, 85 Ohio St. 349; Martin, J., in Seaton *v.* Newark Tel. Co., 1911, New Jersey Court of Common Pleas, 34 N. J. L. J. 368, and 35 ibid. 8; Borgnis *v.* Falk, 1911, 147 Wis. 327.

[9] Nevada, Act of March 15, 1913, Laws of 1913, ch. 111; Illinois, Laws of 1913, p. 335 *et seq.*, §§ 5 and 35. This act "covers not merely hazardous but all employments; though employers in non-hazardous employments not accepting the law do not lose their common-law defenses." "The Survey," vol. 20, p. 630. See Illinois Laws of 1913, p. 339, § 3 (a) and 3 (b).

states passed Workmen's Compensation Acts in 1913 for the first time. Of these seven, only one state, Oregon, took its place under Class 1.[10] The other six states come under Class 2.[11]

Taking the statutes now in force up to Dec. 1, 1913, Class 1 included only five states; viz., Arizona, Kansas, New Hampshire, Washington, and Oregon. To these, New York must now be added. See New York Act of Dec. 16, 1913, ch. 816; more fully stated *post.*

Class 2 includes at least fifteen states.[12] These fifteen states are: California, Connecticut, Illinois, Iowa, Massachusetts, Michigan, Minnesota, Nebraska, Nevada, New Jersey, Ohio, Rhode Island, Texas, West Virginia, and Wisconsin.[13]

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[10] Oregon, Act of Feb. 25, 1913, Laws of 1913, ch. 112, §§ 10, 13, 14, and 31. The Oregon Act was adopted by popular vote in November, 1913.

[11] Connecticut, Act of May 29, 1913, Laws of 1913, ch. 138, part B, § 43; and see also part A, § 2. Iowa, Act of April 18, 1913, Laws of 1913, ch. 147, § 1. Minnesota, Act of April 24, 1913, Laws of 1913, ch. 467, § 34, sub-sections *d* and *g*. Texas, Act of April 16, 1913, Laws of 1913, ch. 179, part IV, § 1; and see also Part I, § 2. West Virginia, Laws of 1913, ch. 10, § 52. Nebraska, Act of April 21, 1913, Laws of 1913, ch. 198, §§ 14 (2), 15 (2), and § 6 (1) and (2).

3 Amer. Labor Legislation Review, p. 382, note 1, says: "The Nebraska Law was referred to the people for a vote in November, 1914."

The act itself contains no provision for submission to popular vote. Probably its operation was suspended by the filing of a referendum petition under article 3, sections 1 B and 1 C of the amended Constitution of Nebraska (printed on p. 6 of the volume containing Nebraska Laws of 1913). Assuming, perhaps rashly, that the act is likely to be approved by the voters, we have classified it with the statutes now in force in other states.

[12] There would be sixteen states if we also include the Maryland Act of April 15, 1912, ch. 837, which may be termed "an elective insurance act."

[13] In connection with Class 1, attention should be called to the constitutional amendment adopted in New York at the November election, 1913 (stated *ante*, p. 236, note 3), and to the statute subsequently enacted by the New York legislature.

The constitutional amendment was passed by the legislature at two successive sessions, in 1912 and 1913, and was then submitted to popular vote. The amendment empowers future legislatures to enact a far more sweeping statute than the Act of 1910, which was held unconstitutional. The compulsory Act of 1910 purported to apply only to certain extra-hazardous occupations. But the amendment, which two successive legislatures voted to submit to the people, contains no restriction of that sort; although, at a hearing before a legislative committee in 1912, such a restriction was advocated by a committee of the Bar Association. See vol. 36, Reports of New York Bar Association, 640, 641, 644.

Since the adoption of the constitutional amendment, New York has enacted a "Workmen's Compensation Law." Act of Dec. 16, 1913, ch. 816.

This act applies only to certain enumerated employments which are therein described as "hazardous."

"Section 2. *Application.* Compensation provided for in this chapter shall be

What is the question arising here as to the construction and effect of the statutes of the six states in Class 1? and why is this question material in the present discussion?

We have contended from the beginning of this paper that the ultimate result brought about by the Workmen's Compensation legislation is utterly incongruous with the result which would be reached under the modern common law of torts; and that hence the enactment of this legislation, assuming it to be both constitutional and just, will give rise to agitation for further changes in the law so as to put certain other persons upon an equality with workmen. But it has sometimes been supposed that the alleged incongruity does not exist in the case of *some* of the Workmen's Compensation Acts, which are believed to fall under a well-recognized exception to the general common-law rule; viz., the exceptional doctrine of absolute liability in cases of extra-hazardous uses or conduct. As to a large part (15 out of 21) of the states where Workmen's Compensation Acts are now in force, there is no color for such an argument. The framers of those acts make no pretense of confining their operation to extra-hazardous occupations. But there are six states, all of which are included in Class 1, *ante*, where the statutes purport to apply exclusively to hazardous occupations; and we have now to consider the construction and effect of these statutes. (We may also consider in this connection the initial English Act of 1897, which was

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payable for injuries sustained or death incurred by employees engaged in the following hazardous employments:"

The statute then enumerates forty-two "Groups" of employments.

Section 3, paragraph 4, provides that "employee . . . shall not include farm laborers or domestic servants."

Section 3, paragraph 7: "'Injury' and 'personal injury' mean only accidental injuries arising out of and in the course of employment and such disease or infection as may naturally and unavoidably result therefrom."

As to the "hazardous employments" enumerated in Section 2:

Group 32 includes *inter alia* the manufacture of boots and shoes.

"Group 37. Flax mills; manufacture of textiles or fabrics, spinning, weaving and knitting manufactories; manufacture of yarn, thread, hosiery, cloth, blankets, carpets, canvas, bags, shoddy or felt."

"Group 38. Manufacture of men's or women's clothing, white wear, shirts, collars, corsets, hats, caps, furs or robes."

Group 41, if we rightly construe it, enumerates among other "hazardous employments" the "operation" on highways of wagons drawn by horses.

probably regarded by many members of Parliament as applying only to extra-hazardous employments.)

The question is, whether the practical effect of these statutes is to allow recovery only in cases where it would have been allowed at common law under the exceptional rule as to extra-hazardous occupations.[14]

Some features of some of the occupations specified in this class of statutes might well be held, at common law, to be extra-hazardous as regards many of the workmen employed therein.[15]

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[14] We mean — "would have been allowed at common law," assuming that the doctrine of a workman's assumption of risk has been abolished.

[15] There are reported decisions as to whether certain occupations or certain uses of property should at common law be considered extra-hazardous toward outsiders, *i. e.*, persons not participating in carrying on the occupation or use. But there is a dearth of decisions as to what occupations or what uses of property should, at common law, be deemed extra-hazardous as to workmen employed therein. And the reason for such lack of authority is obvious. So long as the doctrine of voluntary assumption of risk prevailed, a damaged workman could not successfully base his claim on the specially dangerous nature of the business. Such a claim would have been met by the answer that, by entering into the employment, he had assumed all obvious risks inherent therein, no matter how great.

Undoubtedly it may sometimes be true that a business is specially dangerous to workmen employed therein, though it does not involve special risk to outsiders. But this is not invariably the case; and in regard to some occupations it would seldom be true. Hence the authorities as to what should, at common law, be deemed extra-hazardous toward outsiders are often entitled to weight in determining what undertakings should, at common law, be deemed extra-hazardous towards employees therein.

The extra-hazardous class is generally spoken of as if it were an exceptional class; and as including only a small proportion of cases as compared with the whole number of occupations and with all the various methods of using property. As a general rule, modern courts are not inclined to place an occupation in the extra-hazardous class, unless the danger is very much greater than in case of occupations in general.

While it is difficult to frame an affirmative definition of extra hazard, it is safe to assert (negatively) that certain circumstances do *not* constitute a test of extra hazard.

The test of extra hazard is not merely that there is a possibility of serious harm resulting. That is true of all occupations.

Nor merely that there is a probability of harm resulting from an occupation, unless it is conducted with reasonable care. That, again, is true of occupations in general.

Nor whether a particular occupation is a proper subject for police regulation; a subject as to which the legislature may prescribe rules in reference to the method of carrying it on. Any occupation, when carried on in an improper manner, may create special hazard. The legislature can and does regulate the speed at which horses may be driven in the public streets. But it cannot, therefore, be contended that the driving of a horse is an extra-hazardous business, either as regards the outside public or the driver himself. It is a reasonably safe occupation when properly conducted; *i. e.*, when conducted as it is in the great majority of cases.

Nor is the test whether a particular kind of business, or a particular method of

But these statutes, in effect, allow compensation in various cases where the recovery cannot be accounted for as an application of the common-law doctrine relative to extra-hazardous undertakings.[16] Such cases may be divided into two classes.

First: Where some occupations, which are included in some statutes upon the apparent theory that they are necessarily and always extra-hazardous towards workmen, are not so in their usual features, and are not generally so regarded.

Second: Where an occupation is extra-hazardous only as to certain parts or branches of the undertaking, and an accident occurs while the employee is working in the non-hazardous part. Here the statutes, taken literally, would allow recovery just as much as if the accident had been due to one of the specially dangerous features of the business; and there is a strong tendency to so construe them.

As illustrations of Class 1, reference may be made to statutes which assume that work in a factory is necessarily extra hazardous, or that the use of a steam boiler involves extra-hazard to all workmen in the vicinity, on account of the danger of explosion.

The statutes of five states in Class 1 all specify work in "factories" as one of the extra-hazardous occupations. And a "factory" is (in substance) described as a place where an undertaking is carried on by means of power-driven machinery. These statutes all practically declare that work in a factory is invariably of an extra-hazardous nature.[17] But there are factories and factories.

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using property, was extra-hazardous when it was first introduced. The question is, whether it is extra-hazardous as it is carried on to-day, with a better knowledge of possible dangers and improved methods of preventing accidents. "Modern methods have reduced the risk in many industries." See Mr. C. F. Randolph, in 2 Report United States Commission, 1425.

[16] These statutes generally contain a clause expressly declaring that all the occupations specified in the act are to be deemed extra-hazardous. How far this clause bears upon the special question under discussion in the article will be considered later.

[17] Arizona, Act of June 8, 1912, ch. 14, § 3, paragraph 10; Kansas, Laws of 1911, ch. 218, §§ 6 and 9; New Hampshire, Laws of 1911, ch. 163, § 1, paragraph (b); Oregon, Laws of 1913, ch. 112, §§ 13 and 14; Washington, Laws of 1911, ch. 74, §§ 2 and 3.

The remaining (or sixth) state in Class 1 is New York. The recent New York Act of December 16, 1913, does not say in general terms that all work "in a factory" is hazardous. But the forty-two "Groups" of "hazardous employments" there enumerated include various specified kinds of manufacturing, some of which we think would

In many instances the nature and the present methods of manufacturing are such that no extraordinary risk is involved, and accidents are not frequent. And this is true, not only of many small concerns, but also of many large ones.

To prove the necessity for a Workmen's Compensation Act, figures are often given showing the large number of serious accidents among persons employed in iron and steel manufacturing. But it should not be assumed that these figures fairly represent the average number of accidents in all other kinds of manufacturing. The Report, made in July, 1912, by the Massachusetts Commission on Compensation for Industrial Accidents, contains statistics of the accidents in that state for the year ending April 30, 1912.[18] Table IX, pp. 137–139, gives the number of accidents reported per 1000 employees in each of a large number of different industries. The average for all these industries was between 55 and 56 per 1000 employees. In iron and steel manufacturing the number per 1000 was 158.47. In textiles the number of accidents per 1000 employees was 33.87; little more than one-fifth of the number in iron and steel manufacturing. In the boot and shoe industry (now largely carried on with aid of machinery) the number was 16.47; only a little more than one-tenth of that in iron and steel manufacturing.[19] We do not think that the ordinary textile industries or the boot and shoe industry, as now carried on in factories with modern methods and safeguards, should be deemed "extra-hazardous" within the common-law meaning of that term.

Statistics show a great difference among the various industries, not only as to the whole number of accidents but also as to the number of fatal accidents. The Massachusetts Report states that the highest death-date (4.60 per 1000 employees) is in "the non-manufacturing sub-group under light machinery and electric technical works, including linemen," etc. The Commission says:

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not now be regarded as "hazardous" within the common-law meaning of that term. See *ante*, note 13, as to Groups 32, 37, and 38.

[18] "It is probable that these rates are only approximately correct." A considerable number of the smaller establishments failed to make reports; but the rates given in the state Report seem to furnish a fair basis for comparison. See Report of Massachusetts Commission, A. D. 1912, pp. 119–122.

[19] See Report, 137–139, 129, 121.

"It should be noted that this death-rate is more than ten times as great as that for all industries taken together." Mass. Report, 121.[20]

The New Hampshire Workmen's Compensation Act is apparently framed upon the theory that the use of a steam boiler in a building involves extra-hazardous risk to all persons employed in its proximity, on account of the danger of explosion.[21]

According to the present common law of this country the use of a steam boiler is not extra-hazardous; and the owner is not liable to his neighbor or his employee for damage resulting from a boiler explosion, unless he is proved to have been negligent. When a steam boiler was a new thing and its use a novel experiment, the law might, not improbably, have been held otherwise. If the boiler of Robert Fulton's steamboat "Clermont" had exploded during its trial trip on the Hudson River in 1807, the inventor

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[20] The following figures, as to seven groups of industries, are given in reports on the working of the British Workmen's Compensation Act.

(For 1909, see vol. 2, Report U. S. Commission, 1430. For 1911, see vol. 21, Board of Trade Labour Gazette, pp. 7 and 8.)

	For A. D. 1909	For A. D. 1911
Whole number of employees (exceeding)	6½ millions	7¼ millions
Number under the heading "factories"	4½ millions	nearly 5⅓ millions

	A.D. 1909	A.D. 1911
Taking the seven groups together, the annual charge for compensation averaged for each person employed	6s. 10d.	8s. 5d.
Average rate per person in each group:		
In factories	3s. 5d.	4s. 6d.
In railroads	7s. 1d.	7s. 11d.
In quarries	9s. 2d.	10s. 9d.
In shipping	10s. 8d.	14s. 3d.
In Constructional work	14s. 11d.	13s. 5d.
In Docks	16s. 8d.	21s. 9d.
In Mines	20s. 1d.	23s. 8d.

The above tables do not give the number or percentage of accidents in each of the different varieties of factories. We think it would be found that a large percentage of accidents (*i. e.*, "large" in proportion to the whole number of persons employed in a particular industry) occur in a few special kinds of manufacturing, in which the risk far exceeds that in ordinary factories. Some special varieties of manufacturing might justly be deemed extra-hazardous, in comparison with the risk in ordinary manufacturing.

[21] "All work necessitating dangerous proximity to . . . any steam boiler owned or operated by the employer, provided injury is occasioned by the explosion of any such boiler. . . ." New Hampshire Laws of 1911, ch. 163, § 1.

would, very likely, have been held to be acting at his peril, and hence absolutely liable to persons damaged, irrespective of negligence on his part. But this was not the view entertained sixty-six years later, after particular kinds of danger had become known, and methods of guarding against these dangers had come into general use. In 1873 the New York court *held*, in accord with the general United States doctrine, that the owner of an exploded stationary boiler was not liable unless proved negligent.[22]

Apart from exceptional cases, the use of a steam boiler is not, in modern American common law, regarded as extra-hazardous. The owner is not held liable for damage resulting from the explosion of the boiler, unless he is proved negligent. There is some controversy as to whether the fact of explosion furnishes evidence upon which a jury *may*, if no explanation is offered, find that the owner was negligent. But this relates only to the manner of proving negligence; and, although proof that the boiler exploded might, in some courts, justify the judge in refusing to nonsuit the plaintiff, yet the jury are not, by such proof, compelled to find as a fact that the defendant was negligent.[23] And the doctrine — that in a case of boiler explosion a defendant is not liable unless the jury finds as a fact that he was negligent — governs, not only as between the boiler owner and a stranger or a neighbor, but also as between the boiler owner and his own servant.[24] Courts, in upholding this general doctrine, lay stress upon the frequency with which boilers are used, and the rarity of explosions as compared with the whole number of boilers in use.[25]

In December, 1911, there were upwards of twenty-four thousand steam boilers in Massachusetts which were subject to the provisions of the boiler inspection law. Only three steam-boiler explosions occurred in that state from October 1, 1907, to December 1, 1911. Apparently only one of these three exploding boilers had been

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[22] Losee *v.* Buchanan, 1873, 51 N. Y. 476. See also Marshall *v.* Welwood, 1876, 38 N. J. L. 339.

[23] See Walker, J., in Stewart *v.* Van Deventer Carpet Co., 1905, 138 N. C. 60, p. 66.

[24] See L. & N. R. Co. *v.* Allen, 1885, 78 Ala. 494, 501; Voigt *v.* M. P. C. Co., 1897, 112 Mich. 504; Kramer *v.* Willy, 1901, 109 Wis. 602; and Cavanaugh *v.* Haven Coal Co., 1908, 222 Pa. St. 150.

[25] See Bradbury, C. J., in Bradford Glycerine Co. *v.* St. Mary's Woollen Mfg. Co., 1899, 60 Ohio St. 560, pp. 572–3; Birrell, C. J., in Bishop *v.* Brown, 1900, 14 Col. App. 535, p. 547.

inspected; and the explosion of this inspected boiler was caused by the engineer's screwing down the safety valve to a pressure more than three times the pressure allowed by the state inspector on this boiler. In the report of an inquest held after the explosion, the District Judge said: " . . . I am informed that, out of the 39,572 boilers inspected by the department since 1893, this is the only boiler that has exploded." [26]

We said *ante*, p. 350, that the Workmen's Compensation Acts purporting to limit recovery to damages incurred in extra-hazardous occupations really allow recovery in two classes of cases outside of that limit. We have just been dealing with Class 1, where some of the occupations specified in the statute are not, as to their usual features, extra-hazardous. Now we come to Class 2.

Class 2. Where a specified occupation is extra-hazardous only as to certain parts or branches of the undertaking, and an accident occurs while the employee is working on the non-hazardous part. The statutes do not, in terms, purport to confine the remedy to accidents due to the extra-hazardous features or branches of the business.[27] Such statutes are generally construed as allowing a remedy for an accident occurring in that part of the employment which does not involve extra hazard, just as fully as for an accident due to one of the specially hazardous features of the business. The statute is construed as allowing a remedy for accidents which might have happened just the same in a business which did not involve any extra-hazardous features.

The initial English Act of 1897 (now superseded by the broader Act of 1906) applied only to certain specified occupations, which were not expressly described as extra-hazardous, but which are supposed to have been selected on the theory (whether correct or

[26] Mr. McNeill, Chairman of the Massachusetts Board of Boiler Rules, in 1 Amer. Labor Legislation Review, pp. 78, 79.

[27] In two states where the original Workmen's Compensation Acts applied only to alleged extra-hazardous occupations, the original acts contained special provisions which may have been intended to prevent recovery for accidents not due to the specially hazardous features of the business. See Illinois Act of June 10, 1911, §§ 21, 22; New York Act of 1910, ch. 674, § 217 (a). These original Illinois and New York acts are no longer in force; but provisions of a somewhat similar nature are contained in the Arizona Act of June 8, 1912, Laws of 1912, Second Session, ch. 14, § 2; and see Constitution of Arizona, Article XVIII, § 8. Compare Washington Act of March 14, 1911, ch. 74, § 27.

incorrect) that they were all especially dangerous. It would have been possible for the courts to hold that this statute was intended to give a remedy only for such accidents as were due to the extra-hazardous features of the business. But this view was not adopted by the British courts. On the contrary, they construed the Act of 1897 as imposing absolute liability for accidents occurring in all parts or branches of the general undertaking, including the non-hazardous parts as well as the parts involving special danger.

The English Act of 1897 applies to employment "on or in or about any building which exceeds thirty feet in height, and is either being constructed or repaired by means of a scaffolding, or being demolished. . . ." In Maude *v.* Brook, L. R. (1900), 1 Q. B. 575, a workman engaged in plastering a new house fell from the landing at the top of the stairs and was killed. He was not using a scaffolding, nor was there any scaffolding in his immediate vicinity, but in other parts of the house other workmen were using an arrangement which was held to be a scaffolding. *Held*, that the widow of the deceased could recover, because the building was being constructed "by means of a scaffolding," although the accident was in no way connected with the scaffolding. Rigby, L. J., p. 580: " . . . I think it is not necessary that the accident should have happened by reason of the scaffolding — that is, it need not involve the falling of any one or anything on or from the scaffolding; if we once get a house being constructed by means of scaffolding, any accident happening to a workman employed by the undertakers upon that building would be within the act." In Halstead *v.* Thomson, 3 Scotch Session Cases, 5th Series (1900–1901), 668, recovery was allowed under the above clause in the Act of 1897, although no scaffolding was in use, or even erected, at the time of the accident. A scaffolding had been used before the accident and was used again after the accident; but at the date of the accident the materials of which it was composed were on the ground and not set up.[28]

As to some American Workmen's Compensation Acts an argument in favor of restricted construction finds more support in the language of the statute than in the case of the English Act of

[28] See also Middlemiss *v.* Middle, etc. Committee, 2 Scotch Session Cases (1899–1900), 5th Series, 392; Blovelt *v.* Sawyer, L. R. [1904], 1 K. B. 271, and Prof. Bohlen's comments in 25 HARV. L. REV. 524.

1897. These American statutes apply only to certain specified occupations, which are expressly declared to be extra-hazardous; and the existence of special hazard is practically given as the reason for enacting such legislation. Take, for instance, § 215 of ch. 674, New York Laws of 1910.[29]

"This act shall apply only to workmen engaged in manual or mechanical labor in the following employments, each of which is hereby determined to be especially dangerous, in which from the nature, conditions or means of prosecution of the work therein, extraordinary risks to the life and limb of workmen engaged therein are inherent, necessarily or substantially unavoidable, and as to each of which employments it is deemed necessary to establish a new system of compensation for accidents to workmen" (then specifying eight kinds of employment).

It could be argued with some plausibility that a legislature using the above language did not intend to allow recovery for accidents which were not due to the specially hazardous features of an occupation.[30]

But the chances are very much against the adoption of such a view by the courts. The interpretation given by British courts

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[29] This provision, in substance, has been inserted in the statutes of several states. As heretofore mentioned, the New York act was *held* unconstitutional in Ives *v.* South Buffalo R. Co., 1911, 201 N. Y. 271.

[30] "If the object is to make employers who choose to engage in ultra-hazardous businesses answer for the injury caused to their employees by the exceptional nature of their business, there seems no good reason to hold them answerable for injuries due not to those exceptional risks, but to risks which would attach to any workman working in any business. On the other hand, there seems no particular justice in giving compensation to one workman because he is employed in a business which subjects him to peculiar dangers which have in fact not injured him, and to deny it to another injured in precisely the same way simply because, while his employment did subject him to the risk of the very nature from which he suffered, it did not also subject him to peculiar risks of a totally different sort, thereby becoming ultra-hazardous. If the act singles out servants in certain trades, because of the peculiar risks to which these trades subject them, as worthy of protection not granted other servants in less hazardous employment, it would seem a fair construction of the legislative intent that they were intended to be protected not from the risks which they ran as workingmen and to which all workmen in any employment are subject, but only from those risks which were peculiar to their exceptional employment."

Prof. Bohlen, 25 HARV. L. REV. 521, discussing the meaning of the requirement in both the English acts (1897 and 1906), that the injury to be compensated must be one "arising out of the employment." Compare Indianapolis, etc. Co. *v.* Kinney, 1908, 171 Ind. 612, 617–621.

to the English Act of 1897 is likely to exert great influence upon American judges. And this construction is practically followed in the Report of the United States Employers' Liability and Workmen's Compensation Commission, and also in a recent decision of the Supreme Court of the United States.

The "United States Employer's Liability and Workmen's Compensation Commission," when making their report on February 2, 1912, submitted the draft of a proposed bill; providing (*inter alia*) for compensation to "any employee" of an interstate railroad for accident arising out of and in the course of his employment.[31] This would include employees not engaged in the actual operation of trains, or subject to any of the special hazards peculiar to railroad employment; *e. g.*, it would include a ticket-seller or a clerk in the treasurer's office. The learned Commissioners in their Report [32] argue that the proposed statute is "not objectionable because including employees not engaged in the hazardous part of employment." They say: "The fact that every employee is not subject to these dangers is immaterial." They virtually assert that the justice and the constitutionality of the statute are not affected by this fact.[33]

A similar view is taken by the United States Supreme Court in Second Employer's Liability Cases, 223 U. S. 1, decided Jan. 15, 1912. The court (see page 52) sustained a statute imposing liability for the benefit "of all employees" of "carriers by railroad who are employed in interstate commerce"; although some of them "are not subjected to the peculiar hazards incident to the operation of trains or to hazards that differ from those to which other employees in such commerce, not within the act, are exposed." [34]

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[31] Report of United States Commission, vol. 1, p. 107 *et seq.*

[32] Vol. 1, pp. 50, 51.

[33] The Report cites Louisville, etc. R. Co. *v.* Melton, 1910, 218 U. S. 36; and Mobile, etc. R. Co. *v.* Turnipseed, 1910, 219 U. S. 35, 40. But see Indianapolis, etc. Co. *v.* Kinney, 1908, 171 Ind. 612, 617–621; and compare 218 U. S. 36, p. 57.

Mr. C. F. Randolph regards the court in the Melton case as saying, in effect, that the power to impose upon railways "a singular liability because of their singular hazard is not limited to workmen in the hazardous side of their business, but applies to all their employees." 2 Report United States Commission, 1457.

[34] As to the power of Congress to classify, Van Devanter, J., said, p. 52: The constitution does not "condemn exertions of that power merely because they occasion some inequalities. On the contrary, it admits of the exercise of a wide discretion in

A similar rule seems prescribed in the recent Oregon statute.[35]

The immediate question here is *not* whether a statute imposing absolute liability for pure accident occurring in the non-hazardous part of an employment is within the constitutional power of the legislature. The immediate question here is *not* whether the result reached under such a statute is preferable to the result reached under the common-law rule. Instead, our immediate question here is, whether the result reached under the statute is the same result which would have been reached at common law; whether there is incongruity between the two results.

As to those Workmen's Compensation Acts which purport to apply only to extra-hazardous occupations, the framers of such acts will deny that this legislation constitutes a radical departure from the modern common law of torts. On the contrary, they will contend that this legislation falls within a well-recognized common-law exception to the general common-law rule; viz., the doctrine that a man carrying on an extra-hazardous business does so at his peril, and is absolutely liable for damage occurring entirely irrespective of fault.

We have now attempted to show that the foregoing contention is untenable; so far at least as relates to a considerable portion of the accidents covered by such statutes (as construed by the courts).

And this for one or the other of the following reasons: Either, first, because some occupations included in some of these statutes would not, as to their usual features, have been regarded at com-

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classifying according to the general, rather than minute, distinctions, and condemns what is done only when it is without any reasonable basis, and therefore is purely arbitrary."

[35] "All persons, firms and corporations engaged as employers in any of the hazardous occupations hereafter specified shall be subject to the provisions of this act; . . . provided, however, that where an employer is engaged in a hazardous occupation, as hereinafter defined, and is also engaged in another occupation or other occupations not so defined as hazardous, he shall not be subject to this act as to such non-hazardous occupations, nor shall his workmen wholly engaged in such non-hazardous occupations be subject thereto except by an election as authorized by section 31 thereof; provided, however, that employers and employees who are engaged in an occupation partly hazardous and partly non-hazardous shall come within the terms of this act the same as if said occupation were wholly hazardous. . . ." Oregon Act of Feb. 25, 1913, ch. 112, § 10.

mon law as extra-hazardous; or, second, because at common law the courts would not have held that an accident to a workman in the non-hazardous part of an employment involved the absolute liability of the employer just as much as if the accident had been due to the specially hazardous features of the business.

Hitherto we have not taken into account the clause found in some of the American Workmen's Compensation Acts, which expressly declares, or asserts, that all the occupations specified in the act are, or are to be deemed, extra-hazardous.[36] As an example of such legislation, we give the New York Law of 1910, ch. 674, § 215 (also quoted on another page):

"This article shall apply only to workmen engaged in manual or mechanical labor in the following employments, each of which is hereby determined to be especially dangerous, in which from the nature, conditions or means of prosecution of the work therein, extraordinary risks to the life and limb of workmen engaged therein are inherent, necessary or substantially unavoidable, and as to each of which employments it is deemed necessary to establish a new system of compensation for accidents to workmen" (then specifying eight kinds of employment). Compare Session Laws of the State of Washington, A. D. 1911, ch. 74, §§ 1 and 2.[37]

In most of the states one principal purpose of inserting such a declaration as the one contained in the New York act was, to get over certain apprehended constitutional objections; among others, the objection that the legislature cannot overturn the fundamental doctrine of the modern common law of torts. The framers of the act intended to claim (*inter alia*) that the legislative declaration — that all the specified occupations are extra-hazardous — brings

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[36] See Constitution of Arizona, Article XVIII, § 8: "The legislature shall enact a Workmen's Compulsory Compensation Law applicable to workmen engaged in manual or mechanical labor in such employments as the legislature may determine to be especially dangerous. . . ."

[37] The Workmen's Compensation Acts of some countries are made applicable, not only to certain specified occupations, but also to such other occupations as may hereafter be declared by executive authority to be dangerous. See Western Australia, Act of Feb. 19, 1902, New South Wales, Laws of 1910, No. 10; Belgium, Act of Dec. 24, 1903; summarized in 5 Labatt, Master and Servant, 2 ed., § 1803, and in Report of Massachusetts Commission on Compensation for Industrial Accidents, A. D. 1912, pp. 75–76, 65, 67.

the case within a well-recognized exception to the general common-law doctrine.

If the validity of this method of obviating constitutional objections were a subject for present consideration, it might be suggested that there is certainly some limit to the legislative power of classification or definition.[38]

A classification cannot be supported if it is clearly arbitrary and based on no reason whatever.[39] Suppose that the legislature enacts that ordinary domestic service, such as sweeping a room, or ordinary farm labor carried on without the use of machinery, such as hoeing potatoes, is extra-hazardous. Such an enactment can hardly preclude a court from holding the contrary. *A fortiori*, such a drag-net statute as was proposed (but not enacted) in Minnesota would be ineffective. The bill there proposed (see 6 Illinois Law Review, 255–256) provided "that every employer in the state of Minnesota conducting an employment in which there hereafter occurs bodily injury to any of the employees arising out of, and in the course of, such employment, is, for the purpose of this act, hereby defined to be conducting a dangerous employment, and conse-

[38] Has an American legislature constitutional power to classify according to the relative poverty or wealth of the injured employees? Can they enact that, under the same state of facts, a poor man can, and a well-to-do man cannot, recover compensation? Such seems to be the distinction made in the Rhode Island Act of 1912; suggested, perhaps, by a provision in Section 13 of the English Act of 1906, which, however, was passed by a legislative body not hampered by constitutional restriction.

The Rhode Island Act of April 29, 1912, Article V, § 1, paragraph (b), says: "'Employee' means any person who has entered into the employment of, or works under contract of service or apprenticeship with, an employer, and whose remuneration does not exceed eighteen hundred dollars a year." In most of the American Workmen's Compensation Acts the compensation allowed to each injured workman is proportioned to the amount of wages received by him. The Rhode Island statute *might* have provided that every injured workman should receive a certain percentage (say, for example, fifty per cent) on that part of his wages which did not exceed eighteen hundred dollars, but no percentage on the excess of his wages over and above eighteen hundred. Under such a provision, if A.'s annual wages amount to $1800.00 and B.'s annual wages amount to $1900.00, each, if damaged, would have received fifty per cent on $1800.00; viz., $900.00. But this would not be the effect of the Rhode Island statute as actually framed. Under it, in the case supposed, A. would receive $900.00, while B. would receive nothing.

Would a classification dependent upon color, or race, or membership in a particular organization be constitutional? The Transvaal Act of August 20, 1907, allows recovery to a "workman" only when he happens to be a "white person." See Transvaal Statutes, 1907; Act No. 36, p. 242.

[39] See 6 Illinois Law Review, 255; Freund on Police Power, § 738.

quently subject to the provisions of this act, and entitled to the benefits thereof."

But whether constitutional objections can be obviated by a legislative declaration, such as the one in the New York act, is a question with which we are not now concerned. This article has proceeded throughout on the assumption that the modern Workmen's Compensation Acts are to be regarded as constitutional (all difficulties, if any, being removed by constitutional amendments). After making this assumption and also assuming that justice to workmen requires the passage of a Workmen's Compensation Act, the question for discussion was presented in these terms: "Does not justice require a further change in the law, so as to put persons other than workmen upon an equality with workmen?" In other words, the question raised is, Will not such legislation in favor of workmen lead to a movement in favor of further changes in the law, in order to remove the incongruities which would otherwise exist, between the results reached under the statute in regard to accidents to workmen and the results reached at common law in regard to accidents to persons other than workmen?

What is the legal effect of this legislative declaration as to the extra-hazardous nature of certain occupations? To what class of persons does it relate, and how far does it purport to go?

Literally, it is a declaration that certain occupations are to be deemed extra-hazardous as to workmen engaged therein. But it does not say that these occupations shall invariably be deemed extra-hazardous towards workmen, entirely irrespective of the nature of the proceeding before the court. We think that the declaration as to the extra hazard of these occupations will be effective only in proceedings brought under the statute by workmen to obtain the statutory compensation.

Suppose that judges, in their anxiety to avoid a conflict with the legislature, should hold that such a legislative declaration is conclusive upon the court (upon the judicial branch of the government) when passing upon the question of the constitutionality of the statute. Does this judicial holding compel the general public to adopt, for all purposes, the opinion entertained by the legislature as to the extra-hazardous nature of the specified occupations? Does it prevent the general public from regarding the statute as bringing about a result totally irreconcilable with the fundamental

principle of the modern common law of torts? Does it prevent the general public from thinking that the rule thus established as to workmen is inconsistent with the existing law (which the statute does not purport to change) as to the rights of damaged persons other than workmen? Suppose that, as to some features of the occupations specified in a Workmen's Compensation Act, the courts, before the enactment of such a statute, would have held that, at common law, they were not extra-hazardous either as to workmen or as to outsiders; and that this view would have been generally entertained by reasonable men. Then the statute, which imposes absolute liability to workmen, and to workmen only, has the practical effect of putting workmen in a better position than outsiders; the effect of giving workmen a special protection to which some now unprotected persons have an equally meritorious claim. Such legislation might come to be regarded by the general public as presenting an instance of unjustifiable incongruity; and its enactment would be likely to ultimately lead to an agitation for such further changes in the law as would put outsiders, when damaged by the non-culpable conduct of a business, upon an equality with workmen employed in that business. Can this movement for further change in the law be successfully met and suppressed by the argument that the legislature has changed the nature of these occupations (so far as workmen are concerned) by a declaration that they are in law what they are not in fact? [40]

We have now been giving a good deal of space to discussing the

[40] "It is beyond even the power of the legislature to make that a party wall which is not a party wall. No doubt they might have made provision to the effect that that which is not a party wall shall, for the purposes of a particular act of Parliament, be deemed to be a party wall; but they cannot make what is not a party wall a party wall, any more than they can make a square a circle." James, L. J., in Weston *v.* Arnold, [1873] L. R. 8 Ch. App. 1084, p. 1089. ". . . it is not possible for any legislature to make that a fact which is not a fact." Green, J., in Appeal of Edwards, 1885, 108 Pa. St. 283, 290.

See Bell, J., in State *v.* Canterbury, 1854, 28 N. H. 195, 228; State *v.* Adams, 1872, 51 N. H. 568, 570.

As to the effect of the statute in the above respect, it can make no difference whether the legislature was acting under a general grant, by the constitution, of legislative power; or (as in Arizona) under a command, expressly given by the constitution, to legislate upon the subject-matter in question. In either case, the legislative declaration may govern in proceedings brought to enforce the statute. But under no other circumstances are persons compelled to regard that as hazardous which is really non-hazardous.

construction and effect of the six American Workmen's Compensation Acts which purport to apply only to hazardous occupations. But it is quite possible that the subject we have just been specially considering will soon cease to have any practical importance. It is not improbable that, a few years hence, there may be no statutes of this description in force. The present tendency is very strong to make Workmen's Compensation Acts include most manual occupations, instead of limiting their application to extra-hazardous employment. Such a limitation is found in only six of the twenty-one state statutes now in force.[41]

Of what has heretofore been said this is the sum: The result reached in many cases under the Workmen's Compensation Acts is absolutely incongruous with the results reached under the modern common law as to various persons whose cases are not affected by these statutes. For this difference there is no satisfactory reason.

It is believed that the incongruities heretofore pointed out, resulting from the difference between the statute and the modern common law, will not be permitted to continue permanently without protest. The public are not likely to be "content for long under these contradictory systems." In the end, one or the other of the two conflicting theories is likely to prevail. There is no probability, during the present generation, of a repeal of the Workmen's Compensation Acts. Indeed, the tendency is now in the direction of extension, rather than repeal, of this species of legislation.[42] The only present available method to remove the inconsistency is by bringing about a change in the existing common law, either by legislation or by judicial decisions.

As to legislation (aided perhaps by constitutional amendments); there may be an attempt to bring about State Insurance, not confined to harm suffered by hired laborers.[43] It may extend to an "outsider," who suffers harm from the non-culpable conduct of

[41] As to the Nebraska act, see *ante*, note 11.

[42] "Legislation of this character is in its infancy. . . ." Smith, J., in Cunningham *v.* Northwestern Improvement Co., 1911, 44 Mont. 180, 211.

[43] See Holmes, Common Law, 96.

persons carrying on a business in which he is not a participant.[44] It may not be confined to the case where there is, in the chain of antecedents, the non-culpable conduct of some human being other than the damaged person himself. It may include the case of an independent workman, who is hurt by pure accident, without any human agency other than his own, while conducting his own business on his own account; *e. g.* a small farmer, or a blacksmith who runs his forge without an assistant.[45]

A State Insurance Law may not merely insure against accident, but also against disease, either contracted in the service of another or while the claimant was working on his own account.

It may include damage wholly due to a natural cause, such as a stroke of lightning.[46]

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[44] See illustrations *ante*, as to trolley car.

[45] In support of Workmen's Compensation legislation stress has been laid on the justice of "making every one who consumes any product of labor for hire pay his proportionate amount of the cost of the creation representing the personal injury misfortunes of those whose hands have enabled him to secure the objects of human desire, thus minimizing the sufferings which are the natural incidents of industry and should be borne, so far as they represent pecuniary sacrifice, by the mass of mankind whose desires are administered to by such industry." See Marshall, J., in Borgnis *v.* Falk Co., 1911, 147 Wis. 327, 381.

But why confine relief to labor *for hire*, in the literal sense of that term? Why not include the farmer who is accidentally hurt while raising on his own land, exclusively by his own labor, a crop which is to be sold for consumption? Of course it might be difficult, in the absence of State Insurance, to provide a method of compensating him. He has no employer who could be made the primary paymaster. But if a general system of State Insurance is adopted, and accidental harm occurs to a farmer while engaged in the production of crops for sale and consumption, why should not relief be afforded him equally with a hired workman? And why should relief be restricted to cases where the crop is sold to an outside consumer? Why not give relief where the crop is intended to be consumed by the farmer's own family, and to thus prevent his family from becoming a public charge under the pauper laws?

The farmer's case presents two of the elements especially urged in favor of providing compensation for hired workmen, viz., he was hurt while pursuing a legitimate industry; and he was in no way culpable. He may often be better able pecuniarily to bear the loss than a workman in a factory. But in many cases an accident occasioning total physical disability would ultimately reduce him to poverty. If an accidentally injured hired workman is saved from going to the almshouse by legislation giving him a remedy against a faultless employer, why should not an accidentally injured farmer be allowed relief by, or under, a system of State Insurance?

[46] The British "National Insurance Act" of Dec. 16, 1911, 1 & 2 George 5, ch. 55, bears the following title: "An Act to provide for Insurance against Loss of Health and for the Prevention and Cure of Sickness and for Insurance against Unemployment, and for Purposes incidental thereto."

Under this statute, sometimes called Lloyd-George's Act, the funds to pay insur-

Whether legislation of the above descriptions *ought* to be enacted is a question upon which no opinion is here intimated. Our immediate point is, that the present Workmen's Compensation legislation will inevitably give rise to a plausible agitation for such further legislation.

As to a change in the common law, to be brought about by judicial decisions:

There may be an attempt to induce judges to repudiate the fundamental doctrine of the modern common law of torts that fault is generally requisite to liability, and to go back to the ancient common-law doctrine that an innocent actor must answer for harm caused by his non-culpable conduct.

Or the judges may be urged to adopt a middle or compromise view; that, as between two non-culpable actors, the loss shall be equally divided.[47]

Several questions arise:

1. Can the judges change the law?
2. Ought they to change the law?
3. Will they change the law?

The objection may be raised that judges cannot make, or change, law; not merely that they cannot alter statute law, a result which is admittedly beyond their power; but that they cannot make or alter law on subjects not dealt with by the legislature.

There are at least three different theories as to judicial law-making.[48]

1. That judges cannot "make" law; that they merely discover and apply law which has always existed.[49]

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ance are derived partly from employers and employees; and partly, as we understand it, from moneys provided by Parliament. See Statutes for year 1911, p. 338, part 1, § 3.

[47] "Doubtless, as the law now stands, Holmes *v.* Mather and Stanley *v.* Powell were correctly decided. But is it possible to believe that such decisions represent the last word in human justice, or that an application of some such principles as insurance or division of loss would not have been more in accordance with enlightened jurisprudence, and more satisfactory to the public conscience?"

Digest of the English Civil Law, by Edw. Jenks *et als.*, Book 2, part 3, preface, p. xv. Compare Prof. Whittier, 15 HARV. L. REV. 335, quoted *ante.*

[48] See 60 Univ. Pa. Law Rev., 466–467.

[49] See Mr. James C. Carter's posthumously published work, "Law, Its Origin, Growth and Function."

2. (A middle view.) That judges can and do make new law on subjects not covered by previous decisions; but that judges cannot unmake old law, cannot even change an existing rule of "judge-made" law.[50]

3. That judges can and do make new law; and also can and do unmake old law; *i. e.*, law previously laid down by themselves or by their judicial predecessors.[51]

We prefer the third view. But if the second view is adopted, the result here would not be to sustain and preserve unaltered (unless by legislation) the common law as declared by the courts in A. D. 1900; but, instead, to sustain the law as formerly declared in A. D. 1400 by the judges of that day. If judges have no power to change (*i. e.*, if they cannot change) law "made" by their judicial predecessors, then, of course, they have not legally done that which they had no legal power to do (that which they could not do). Hence it would follow that the common law of 1400 is still in force; and that the decisions in more recent times, purporting to establish a contrary rule (*i. e.*, the rule now known as the modern common-law doctrine), are simply instances of judicial usurpation.

But, as already intimated, we prefer the third view, that judges can and do make new law and unmake old law. Under this view the judges have heretofore changed the law of A. D. 1400 to the law of A. D. 1900, and still have now the power to change it back again. Assuming, then, that the judges can turn the hands of the legal clock back five centuries, the questions remain:

Ought they to make the change?

Will they make the change?

As to whether the change will be made: it is safe to say that, while it may take place, yet it is not likely to be done directly and avowedly. When courts change the substantive law, they generally do so very gradually, and often attempt to conceal (or perhaps unconsciously conceal) the fact of change by using various "fiction phrases." [52]

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[50] See Prof. A. V. Dicey, in "The Relation between Law and Public Opinion in England," ch. XI, and more fully in the Appendix, pp. 481–493.

[51] See Prof. John C. Gray, in "The Nature and Sources of the Law," §§ 215–231, 465–512, 545–550, 628–636.

[52] See 60 Univ. Pa. Law Review, 466.

Judges, however, are not insensible to public opinion; and legislation, evidencing public opinion, has a reflex action on courts.[53]

Even if courts should shrink from directly and avowedly changing the law, the result could be, to a considerable extent, accomplished by indirect methods. By a very liberal construction of the *res ipsa loquitur* doctrine; by a broad view as to what constitutes *primâ facie* evidence of negligence; and by inverting the burden of proof (putting on defendant the burden of proving that he was not negligent), — the court could go far towards practically reversing the common law of A. D. 1900 in a large proportion of cases.

Whether this change *ought* to be made (whether it is expedient for either courts or legislatures to make it) is a problem of immense importance, which we here make no attempt to solve. At the very beginning it was said: "The object of this paper is to give notice of an impending question of great importance; not to give an answer to the question, but to show how and why it arises at the present time."

The aim has been to bring out distinctly the exact question, and to show that it must be met and cannot be evaded. How it should be answered is a matter not to be dealt with here.

At the outset, it was assumed for present purposes that the basic principle of the Workmen's Compensation Act is just; that justice to workmen requires the enactment of such a statute.

We have now attempted to show that, if justice to workmen requires such an enactment, then justice to certain persons other than workmen must also require similar legislation for their benefit; in other words, that the benefit of legislation on this basic principle cannot justly be confined to workmen.

We have also attempted to show that, if the above positions are correct, then the common law of A. D. 1900 is wrong in principle and ought to be repudiated.

But our temporary assumption — as to what justice to workmen requires — will probably be disputed by many lawyers, when it is sought to push the consequences of this assumption to its logical result.

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[53] See Lord Hobhouse, in Smart *v.* Smart, L. R. [1892], Appeal Cases, 425, pp. 434, 435, 436; Hoar, J., in Amory *v.* Meredith, 1863, 7 Allen (Mass.) 397, p. 400; Bell, J., in Coffin *v.* Morrill, 1851, 22 N. H. 352, p. 357; Bell, J., in Jewell *v.* Warner, 1857, 35 N. H. 176, p. 183; State *v.* Franklin Falls Co., 1870, 49 N. H. 240, pp. 256–257.

Without indicating our own view as to the intrinsic justice, either of the Workmen's Compensation legislation or of the common law of A. D. 1900, it seems safe to say that the basic principles of the two are irreconcilable. They cannot both be wholly right, or both wholly wrong.

If the Workmen's Compensation Act is regarded as right in principle and the common law of A. D. 1900 as wrong in principle, then the argument is strong in favor of repudiating the common law of A. D. 1900 and going back to the common law of A. D. 1400.

If, on the other hand, the Workmen's Compensation Act is regarded as wrong in principle and the common law of A. D. 1900 as right in principle, then there is strong ground for repealing the Workmen's Compensation legislation, and adhering to the common law of A. D. 1900.

If, however, it is found impracticable to procure the repeal of the Workmen's Compensation Act, and this legislation in its extreme form is to remain on the statute book, then the question will be raised — whether the desirability of attaining uniformity and consistency of principle between statute law (in matters of wide application) and common law, renders it expedient to repudiate the modern common law (even though it be intrinsically correct) and substitute the doctrine of the ancient common law? As to this question, no opinion is here intimated.[54]

Jeremiah Smith.

CAMBRIDGE, MASS.

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[54] On page 249, *ante*, California should be added to the states which now have "compulsory" statutes. Laws of 1913, ch. 176; Act of May 26, 1913. See constitutional amendment, adopted Oct. 10, 1911, printed in volume of California Laws, Extra Session of 1911, page lvi.